

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of

Petition for Rulemaking of Fibertech  
Networks, LLC

RM-11303

**COMMENTS OF VIRTUAL HIPSTER**

Respectfully Submitted:

Shad Nygren  
**VIRTUAL HIPSTER CORPORATION**  
P.O. Box 1091  
N.W.  
Fallon, NV 89407  
(888) 428-2186  
<http://www.hipster.net>

Maria T. Browne  
**COLE RAYWID & BRAVERMAN, LLP**  
1919 Pennsylvania Avenue,  
  
Suite 200  
Washington, D.C. 20006  
(202) 659-9750  
(202) 452-0067 (fax)  
[mbrowne@crblaw.com](mailto:mbrowne@crblaw.com)

Jeremy Stern  
**COLE RAYWID & BRAVERMAN, LLP**  
2381 Rosecrans Avenue – Suite 110  
El Segundo, CA 90245  
(310) 643-7999, ext. 100  
[jstern@crblaw.com](mailto:jstern@crblaw.com)

**Counsel for Virtual Hipster Corporation**

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Pursuant to the Public Notice released December 14, 2005 in the above-referenced proceeding, Virtual Hipster Corporation (“Virtual Hipster”) submits these comments in support of the petition for rulemaking filed by Fibertech Networks, LLC (“Fibertech”) requesting the Commission to adopt certain standard practices for pole attachments.<sup>1</sup> Virtual Hipster agrees with Fibertech that the time is ripe for the Commission to address certain practices being employed by pole owning utilities that are resulting in unnecessary delays and unreasonable costs for new, competitive entrants. Moreover, Virtual Hipster respectfully requests the Commission to seize the opportunity afforded by any such rulemaking proceeding to clarify that attachments for wireless facilities to distribution poles must be priced using the Commission’s historic cost based formula for telecommunications. Such clarification is essential to effectuate the Administration’s goals of universal

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<sup>1</sup> *In the Matter of Petition for Rulemaking of Fibertech Networks, LLC*, Petition for Rulemaking of Fibertech Networks, RM-11303 (filed December 3, 2005) (hereinafter “Petition”).

broadband coverage by 2007 and to ensure the delivery of valuable communications services to rural, underserved areas of the country and tribal lands.

## **I. Introduction and Summary**

Virtual Hipster, a Nevada competitive local exchange carrier (“CLEC”), provides competitive telephone service, dial-up Internet, broadband wireless Internet, and Voice over IP (“VoIP”) service to residents and businesses in rural Nevada. Spawned by the promises of the Telecommunications Act of 1996, Virtual Hipster’s goal was then, and is now, to bring competition and advanced services to underserved, rural areas of the state.

The towns that Virtual Hipster is working to serve are sparsely populated – most with populations of less than 25,000 and many with fewer than 100 residents<sup>2</sup>— and are often separated by distances of 30 to 50 miles or more with nothing but desert between. These smaller towns are made up of tribal land, mining and ranching businesses and settlements, U.S. Military training facilities and the people that work there and in the supporting communities. The Commission has recognized that wireless technology often provides the only practical method of delivering much needed communications services to these rural communities and tribal lands.<sup>3</sup>

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<sup>2</sup> For example, in Lyon County, the towns of Dayton, Fernley, Mark Twain, Mound House, Silver City, Silver Springs, Smith Valley, Stagecoach and Yerington have a total population of 34,501 and a population density of 17 people per square mile.

[http://en.wikipedia.org/wiki/Lyon\\_County,\\_Nevada](http://en.wikipedia.org/wiki/Lyon_County,_Nevada).

<sup>3</sup> Separate Statement of Commissioner Kevin J. Martin, *In the Matter of Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural*

Indeed, the large majority of these towns are underserved by telecommunications and Internet service providers, a problem not only for the residents but also for persons traveling the state's thoroughfares.<sup>4</sup>

Virtual Hipster currently provides service to 175 customers in rural Nevada using primarily wireless technology operating in the 2.4 GHz spectrum at prices that are less than two-thirds of the prices being offered by incumbent providers. Virtual Hipster has received numerous additional requests for its wireless broadband services. Indeed, the Commission has recognized the significant consumer demand for unlicensed wireless broadband services.<sup>5</sup> However, the equipment used to provide unlicensed wireless broadband has limited range – approximately a 600 foot radius or ¼ mile coverage area – especially in more densely populated areas where buildings, trees and other spectrum users can interfere with Virtual Hipster's service. Under Virtual Hipster's current business plan,<sup>6</sup> it will need approximately four to five antenna sites per linear mile or 16 to 25 antenna sites per square mile to meet its coverage needs.

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*Telephone Companies To Provide Spectrum-Based Services*, Notice of Proposed Rulemaking, 18 FCC Rcd 20802 (Oct. 6, 2003) (hereinafter "Martin Statement").

<sup>4</sup> For example, often there is no cell phone service, or where it exists, it is analog. Similarly, Internet connections are limited to dial-up for which long distance rates apply; DSL and cable modem are not available in these small, remote towns.

<sup>5</sup> *In the Matter of Unlicensed Operation in the TV Broadcast Bands – Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Notice of Proposed Rulemaking, ET Docket Nos. 04-186 and 02-380 (rel. May 25, 2004) at ¶7.

<sup>6</sup> While Virtual Hipster currently uses primarily unlicensed spectrum to deliver 802.11b/g services, it intends to deploy additional services in the future, and is examining various methods of acquiring spectrum, such as participating in upcoming FCC spectrum auctions (e.g., the FCC's 700 MHz auctions, or the Advanced Wireless Service auction) or partitioning or disaggregating spectrum from existing CMRS licensees, in order to provide commercial wireless telecommunications service in its market area.

Access to existing utility poles and rights-of-way thus is critical to Virtual Hipster's deployment of its antennas and wireless equipment. Use of the existing utility distribution pole infrastructure enables Virtual Hipster to avoid constructing new stand-alone towers or building mounted antennas, which are often disfavored by local jurisdictions, and, as a result, difficult and costly to site. For example, in new housing developments, towers typically are not allowed on private property and the only suitably tall structures for mounting antennas are street light poles, owned by either the unregulated private development or municipality, or the electric utility. Moreover, at least one Nevada county prohibits tower construction within 1,500 feet of highways (with apparent disregard for whether the tower would be sited on private property or in the public ROW) – a distance greater than twice the range of Virtual Hipster's equipment and encompassing an area within which most of the people and businesses are located.

Thus, to site its antennas at these critical locations and deliver its affordable communications services to rural communities, Virtual Hipster requires access to existing poles under just and reasonable terms and conditions. However, in attempting to gain such access, Virtual Hipster has encountered unreasonable rates, terms and conditions for access, as well as unjust delays in negotiating terms and conditions of access.

Specifically, in negotiations with a Nevada based utility that have dragged on now for over five months, Virtual Hipster was quoted attachment

rates of \$12,000 per pole per year<sup>7</sup> – an amount that is approximately 1,000 times (or 100,000 percent) more than the rates being paid by wireline attachers and that far exceeds the revenue that Virtual Hipster can possibly generate from a single pole.

By way of example, the maximum number of customers that Virtual Hipster can serve from a single access point or pole attachment is 10 – and Virtual Hipster will construct an access point where at least two to three customers request service. Virtual Hipster currently is offering service at \$19.95 per month, but competition is driving the prices down, and Virtual Hipster anticipates that the price point will probably stabilize around \$10 per month in a few years.<sup>8</sup> However, even at current prices and with the maximum number of subscribers served by an access point, the potential revenue from a single pole attachment is at most \$200 per month, or \$2,400 per year. Thus, a rate of \$12,000 per pole per year, if allowed, would effectively preclude Virtual Hipster from deploying its affordable communications services to underserved areas of the state.

## **II. Virtual Hipster Supports Fibertech's Petition And Other Comments Filed In Support of a Rulemaking Proceeding To Consider The Amendment Of The Pole Attachment Rules**

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<sup>7</sup> Initially, the utility would not provide a quote for rates, stating instead that it would develop rates on a case by case basis. Only after months of costly negotiations, did the utility provide rates of \$12,000 per year, and only after warnings that such quotes left Virtual Hipster with no choice but to involve the Commission, did this utility then offer an annual attachment rate of \$1,500 per month – a rate that is still more than 10,000 percent more than the amount per pole being paid by its wireline competitors.

<sup>8</sup> Recently SBC began marketing DSL for \$14.95 per month. Virtual Hipster expects that its revenue per customer will continue to decline over the next few years similar to what occurred with dialup Internet.



In its Petition, Fibertech asks the Commission to initiate a rulemaking to consider the adoption of seven standards and practices for pole and conduit access. Petition at 5. Virtual Hipster supports rules, such as those proposed by Fibertech, that would add certainty and remove delay from the attachment process, and thus enable competitive entrants to deploy their facilities and provide services to the benefit of consumers.

Specifically, Virtual Hipster supports rules that would require utilities to apply non-discriminatory construction standards, such as allowing boxing and extension arm attachment techniques, impose enforceable timeframes on the attachment process, permit attachers to hire and supervise approved outside contractors where pole owners cannot meet these timeframes, and permit post-attachment application for drop poles. Such rules are necessary to address the recalcitrance and inflexible pole practices of utilities.

In Virtual Hipster's experience, utilities are invoking alleged safety concerns discriminatorily to deny certain attachments when in fact, no safety problems are presented. For example, one utility recently announced that it would no longer permit the installation of any cross connect boxes, power supplies, or other optical or electrical devices in the first 18 feet of the pole claiming that the pole must remain "climbable" under the NESC. In fact, this utility's poles have existing equipment mounted in the first 18 feet on a significant number of its distribution poles and most, if not all, of its poles are accessible by bucket trucks or pole mounted ladders. Accordingly there is no

legitimate safety concern addressed by this discriminatory requirement which flies in the face of Commission precedent.<sup>9</sup>

Similarly, the same utility requires an on-site signal termination switch for the signals being transmitted by Virtual Hipster's wireless devices allegedly so that linemen can turn off Virtual Hipster's signal so as not to be exposed to harmful RF emissions. However, as Virtual Hipster has demonstrated to this utility, its equipment emissions do not exceed OET-65 levels at any distance and thus, do not present a danger to workers. Nevertheless, the utility is insisting on the installation of such a switch, at Virtual Hipster's expense, and will not guarantee advance notice to Virtual Hipster in the event its signal is turned off in the course of the utility's "routine maintenance." This could be a real problem for Virtual Hipster's ability to offer E911 services.

Finally, this utility has effectively denied attachment in the power supply space, claiming that it has no workers that are qualified to work on communications devices in the power supply space, but insisting that only qualified workers – i.e., its workers or approved contractors – perform this type work. At the same time, it has refused to cooperate in advance of application for specific pole sites, to assist Virtual Hipster in identifying poles that *are* suitable for attachment.

All of this has lead to significant delays in the negotiation process. Indeed, as raised in the Reply Comments of T-Mobile USA, Inc. filed

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<sup>9</sup> *Cavalier Telephone, LLC v. Virginia Elec. Power Co*, 15 FCC Rcd 9563 (2000) at ¶19.

December 19, 2005 in response to the Petition of the United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures in RM-11293, delays in the negotiating process alone present serious obstacles for deployment. Similar unjust and unreasonable delays by pole owners in access negotiations are impeding Virtual Hipster's ability to offer sought-after services to underserved areas. Similar delays in the attachment process would undoubtedly result in foregone subscribers.

In sum, as succinctly stated by Fibertech, utility poles are the "foundation of any modern network" (Petition at 3) and without Commission intervention, Virtual Hipster, a Nevada CLEC, will not be able to deploy the infrastructure necessary to offer its services to rural portions of the state of Nevada. Accordingly, Fibertech's petition should be granted, and the Commission should open a rulemaking proceeding to consider pole owner practices in granting access to competitive wireline and wireless providers.

### **III. Any Such Rulemaking Should Clarify That The FCC's Formula For Pole Attachments By Telecommunications Providers Applies To Wireless Attachments**

The Commission consistently has stated that its formula for pole attachments by telecommunications providers applies to wireless attachments. In its 1998 Report and Order adopting the telecommunications rate formula, the Commission stated "There is no clear indication that our rules cannot accommodate wireless attachers' use of poles when negotiations

fail.”<sup>10</sup> Similarly, in a 2003 case involving wireless attachments, the Commission ordered PECO Energy to provide Omnipoint with historical pole cost data, in accordance with Section 1.1404 of the Commission’s rules, for calculation of rates for wireless attachments.<sup>11</sup> And, in a 2004 public notice, the Commission reiterated the obligation of pole owning utilities to provide wireless telecommunications providers with access to utility poles at reasonable rates pursuant to Section 224,<sup>12</sup> which limits recovery to the fully allocated “operating expenses and capital costs attributable to the entire pole.”<sup>13</sup> Indeed, the United States Supreme Court upheld the FCC’s determination that Section 224’s rate regulation and access provisions apply to wireless providers.<sup>14</sup>

Nevertheless, pole owning utilities are taking the position that rates for wireless attachments are unregulated and that, as a result, pole owners may charge market-based rates for access by wireless attachments— in the range of \$12,000 per pole per year, nearly 1,000 times (or 100,000%) more than the rates produced using the Commission’s historic cost based formula

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<sup>10</sup> *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) (hereinafter “*Telecom Order*”) at ¶ 42.

<sup>11</sup> *See Omnipoint Corporation v. PECO Energy Company*, 18 FCC Rcd 5484 (Mar. 25, 2003) at ¶7 and n.19 (ordering PECO to provide historical cost data, in accordance with section 1.1404 of the rules).

<sup>12</sup> Public Notice, *Wireless Telecommunications Bureau Reminds Utility Pole Owners of their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates* (rel. Dec. 23, 2004).

<sup>13</sup> 47 U.S.C. 224(d)(1); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987). Congress further defined these terms in Senate Report 95-80 as “the costs to the utilities, irrespective of the CATV attachment, of owning and maintaining the pole, including interest on debt, return on equity, depreciation, taxes, administrative and maintenance expenses.” S. Rep. No. 580, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 13 (1977) (App. Tab 1).

<sup>14</sup> *National Cable & Telecommunications Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

for wireline attachments.<sup>15</sup> Indeed, if permitted by local zoning ordinances, Virtual Hipster could set a brand new pole for approximately \$1,000 – the cost of renting one month of pole space at quoted rates of \$12,000 per pole per year. Such absurdly high rates fly in the face of Commission precedent, would result in dramatic over-recovery for pole owners, and are completely contrary to the public interest.

Virtual Hipster seeks to lease *excess* capacity on existing poles, without foreclosing the utilities' own use of the poles, at no additional cost to the utilities. Indeed, in addition to rent, the Nevada pole owner with which Virtual Hipster is negotiating demands, among other charges, a \$200 application processing fee, complete reimbursement for pre, post and periodic inspections, and fees for any rearrangements and pole changeouts necessitated by Virtual Hipster's attachments. On top of this, the FCC's telecommunications formula reimburses the pole owner for a proportionate amount of the carrying charges associated with the poles, including a return on investment, based on the amount of space occupied by the attachment. As recognized by the Commission, the FCC's formula "accomplishes the key objectives of assuring just and reasonable rates to both the utility and the attaching parties, establishing accountability for prior cost recoveries, and

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<sup>15</sup> The Commission's historic cost based formula produces wireline rates for telecommunications attachments as low as \$2.40 per foot and that rarely exceed \$20 per foot.

encouraging negotiation among the parties by providing regulatory certainty,”<sup>16</sup> and as held by courts, fairly compensates pole owners.<sup>17</sup>

Virtual Hipster acknowledges that its current attachments would occupy more pole space than its wireline brethren. At present, Virtual Hipster is seeking to attach two types of antennas (omni and dish) and an equipment shelter, which all together occupy approximately five feet of vertical pole space. However, the formula’s presumption that attachments occupy one foot of space is rebuttable – thus, this is simply a matter of adjusting the amount of space occupied by the attachment in the formula.<sup>18</sup> For example, assuming that the telecom formula produces a rate of \$10 per foot per year, and Virtual Hipster occupies five feet of space, Virtual Hipster’s rate should be in the neighborhood of \$50 per year. This is comparable to the result reached by state PSCs in certified states.

Application of the Commission’s telecommunications formula is not only clearly required by Commission precedent, it is in the public interest. The Commission has recognized that just and reasonable cost based rates are necessary to “improve the coverage and reliability of [ ] wireless networks in a cost-efficient and environmentally friendly manner,” recognizing that “[s]uch deployment will promote public safety, enable wireless carriers to

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<sup>16</sup> *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC 6453 (2000) at ¶¶9-10.

<sup>17</sup> *Alabama Power Co. v. FCC*, 311 F. 3d. 1357 at 1370-1371 (11th Cir. 2002) (“any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation”).

<sup>18</sup> *Telecom Order*, 13 FCC Rcd 6777 at ¶ 91.

better provide telecommunications and broadband services, and increase competition and consumer welfare in these markets.”<sup>19</sup> The Commission has also recognized the critical role that wireless providers play in public safety, through the imposition of performance based E-911 requirements and its consideration of extending the Emergency Alert System requirements to wireless providers.<sup>20</sup> Moreover, wireless technology is essential for the deployment of communications services to the rural areas and tribal lands served by Virtual Hipster. As stated by now Chairman Martin:

“[O]ne of the Commission’s most important priorities is to facilitate the deployment of communications services in rural America. Wireless services are particularly critical in rural communities where such technologies may provide not only the most efficient, but sometimes the only practical method of offering communications services. Accordingly, it is crucial that we fulfill our obligation to promote the development and rapid deployment of wireless services in rural America.”<sup>21</sup>

Indeed, the Commission has invested significant resources to create a competitive wireless environment and make more spectrum available to wireless users.

Tellingly, the United Power Line Council recently filed a petition to have broadband over power lines declared an unregulated information

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<sup>19</sup> Public Notice DA 04-4046 (rel. Dec. 23, 2004).

<sup>20</sup> *In the Matter of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order to Stay issued in CC Docket No. 94-102 FCC 02-210 (rel. July 26, 2002) at ¶4; *Review of the Emergency Alert System*, Further Notice of Proposed Rulemaking in EB Docket No. 04-296, 69 (rel. Nov. 10, 2005) at ¶69.

<sup>21</sup> Martin Statement, 18 FCC Rcd 20802 (Oct. 6, 2003). *See also* Separate Statement of Commissioner Michael J. Copps, *In the Matter of Extending Wireless Telecommunication Services to Tribal Lands*, Third Report and Order, 19 FCC Rcd 17652 (Sept. 2, 2004) (“The FCC has a special responsibility to increase telephone penetration rates in tribal lands. Access to telecommunications services on tribal lands continues to lag significantly behind other parts of the country despite our current efforts.”)

service, suggesting that the long anticipated entry of electric utilities into broadband services is close at hand, and pole attachment negotiations will only become more heated as pole owners' competitive interests take center stage. Alternative services, such as those being offered by competitive local exchange carriers such as Virtual Hipster, do not stand a chance if electric utilities are allowed to continue charging astronomical rates for attachment of wireless facilities. Accordingly, the FCC must intervene and amend its rules to clarify that the FCC's telecommunications formula applies to wireless attachments

### **Conclusion**

For the foregoing reasons as well as the reasons set forth in Fibertech's Petition, Virtual Hipster respectfully urges the Commission to initiate a rulemaking to amend its current rules to eliminate unnecessary delay in the deployment of competitive services and to clarify that the Commission's telecommunications formula applies to wireless attachments.

Respectfully Submitted,

/s/ Maria T. Browne

Shad Nygren  
**VIRTUAL HIPSTER CORPORATION**  
P.O. Box 1091  
N.W.  
Fallon, NV 89407  
(888) 428-2186  
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Maria T. Browne  
**COLE RAYWID & BRAVERMAN, LLP**  
1919 Pennsylvania Avenue,  
Suite 200  
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(202) 659-9750  
(202) 452-0067 (fax)



[mbrowne@crblaw.com](mailto:mbrowne@crblaw.com)

Jeremy Stern  
**COLE RAYWID & BRAVERMAN, LLP**  
2381 Rosecrans Avenue - Suite 110  
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